

IN THE DISTRICT COURT
AT MANUKAU

CRI-2016-092-009323
[2016] NZDC 26065

COMMERCE COMMISSION
Prosecutor

v

NEW ZEALAND VACUUM CLEANER COMPANY LIMITED
Defendant

Hearing: 19 December 2016
Appearances: A McClintock and C A Watt for the Commerce Commission
N Gedye QC and S Jass for the Defendant
Judgment: 19 December 2016

NOTES OF JUDGE J BERGSENG ON SENTENCING

The charges

[1] The New Zealand Vacuum Cleaner Company Limited, which trades as Godfreys, has pleaded guilty to 10 charges under the Fair Trading Act 1986. I am advised that this is the first occasion that these particular charges have come before the Court on an exclusive basis, that is, not part of other and often more serious offending.

[2] Godfreys, as I will refer to the defendant, has pleaded guilty to five charges under s 36U Fair Trading Act 1986 of being a warrantor under an extended warranty agreement failed to ensure its extended warranty agreements complied with s 36U(2), and also a further five charges in respect of s 36U(3). Section 36U(2) relates to ensuring that the information specified in the Act is set out on the front page of the extended warranty agreement, and s 36U(3) relates to the requirement for in addition to written disclosure being given that the warrantor must, where

reasonably practicable, give the consumer oral notice, before the agreement is entered into, of the consumer's right to cancel the agreement within five working days and how to cancel the agreement.

The facts

[3] The summary of facts is not in dispute. Godfreys is a reasonably significant retailer. It operates 31 stores nationwide. It has been in operation in New Zealand for the past 15 years. Its parent company is Australian-based. In 2010 Godfreys began to sell extended warranties as part of its business. There were two price points that existed. For products valued between \$200 and \$599 the cost of an extended warranty was \$49. That was later increased to \$69. For products valued at \$600 or more the cost of an extended warranty was \$99.

[4] On 17 June 2014 the Fair Trading Act 1986 was amended so that s 36U became operative. This relates to the disclosure requirements that I have just discussed. The charges faced by Godfreys cover the period 17 June 2014 until 22 September 2015, a period of some 15 months. Over that 15-month period Godfreys sold a total of 3202 extended warranties. Of that number, 978 were sold in respect of products valued at \$600 or more. Since the time of the Commerce Commission investigation, that is 22 September, no further extended warranties have been sold.

[5] The Commerce Commission became involved in this matter when they received a complaint in respect of an extended warranty sold by Godfreys. The complaint did not relate to any of the matters before the Court today. That complaint has since been addressed. However, once the Commerce Commission became involved, they enquired into the nature of the information being given by Godfreys to the consumers when selling an extended warranty. A voluntary interview was conducted with Godfreys' general manager as at 18 March 2016. It is apparent that Mr Mason on behalf of Godfreys was fully co-operative with the Commission in terms of their investigation. It is due to Godfrey's compliance with the investigation that the detailed information in respect of the 3202 warranty sales has come to light.

[6] The summary of facts also highlights previous dealings that have been held between the Commerce Commission and Godfreys. Godfreys have not been the subject of any prior prosecution. Between 2008 and 2013 six letters were written by the Commerce Commission to Godfreys regarding potential non-compliance with the Fair Trading Act 1986. None of the letters related to warranty disclosure requirements. However, three of the letters reminded Godfreys of its general obligations under the Fair Trading Act 1986 and two of the letters reminded Godfreys of the need to implement some kind of compliance policy to ensure that its ongoing obligations under the Act were met.

[7] What is clear in this case is that Godfreys were unaware of the enactment of s 36U and, accordingly, they have failed to comply with virtually all of the requirements of s 36U(2), and they have accepted that they have failed to comply totally in respect of s 36U(3).

[8] The sale of the extended warranties has meant that Godfreys have been paid just over \$169,000 for the 3202 warranties. Information given by Godfreys indicates that the costs of meeting warranty claims has been in the vicinity of \$155,000. Godfreys have submitted, and I accept, that the sale of extended warranties was not part of its core business.

[9] In terms of its costs of meeting warranty claims, little can be taken from the global figure of \$155,000 as it cannot be broken down further into those costs that it would have been obliged to meet under the Consumer Guarantees Act 1993 in any event.

[10] In terms of the detriment to Godfreys' customers, what the summary of facts states is that Godfreys' conduct has caused harm to its customers. Its failure to disclose the required information meant that its customers were unable to properly and fairly assess the benefits and, therefore, value of the extended warranty they purchased. The effect of Godfreys' deficient disclosure is that customers paid for an extended warranty that they might otherwise not have purchased.

Submissions made

[11] Submissions have been filed on behalf of the Commissioner and also on behalf of Godfreys. In each instance, the submissions have been helpful.

The Commissioners position on penalty

[12] On behalf of the Commissioner, it is submitted that the starting point, on a global basis, should be a fine in the vicinity of \$110,000 to \$130,000. The Commissioner's submissions are that the extent of the non-compliance was absolute and extensive. It occurred in the context of the Commissioner having previously emphasised to Godfreys the need to implement a New Zealand compliance policy regarding its obligations under the Fair Trading Act 1986.

[13] It is submitted that the relevant factors in setting the penalty include a consideration of objects of the legislation, the duration of the offending, the number, the scope and the extent of the offending, and what is submitted to be a high degree of negligence on the part of Godfreys. It is put as bordering on indifference to the laws of New Zealand. It notes that Godfreys used the same form in both Australia and New Zealand in terms of its extended warranty contracts. The indifference comment is said to be emphasised as it comes against the background of the previous Commissioner's correspondence, whereby Godfreys were effectively put on notice of their need to ensure compliance with the Fair Trading Act 1986.

[14] In terms of the level of harm, it is submitted it has been significant. Because of the lack of information, it has meant that consumers have simply had no prospect of understanding the nature and the terms of the extended warranty agreement. It is noted that in respect of approximately two thirds of the warranties that were purchased the cost of the warranty ranged between 12 and 25 percent of the cost of the goods. It made up a significant component of the sales.

[15] When those factors are taken into account, it is submitted that this should be seen as offending towards the top end of the range. Ms McClintock in oral submissions today has emphasised that there is a need for general deterrence when it

comes to imposing the penalty today, that Godfreys is a relatively large retailer, and that the fine imposed should be significant enough not only to deter Godfreys in the future but also retailers operating within the market.

[16] A number of cases have been referred to me, although it is accepted that they are of limited value. There is no tariff decision. These are new provisions of the Act and there is limited guidance. It is submitted by Ms McClintock that reference to cases that have dealt with s 17 Credit Contracts and Consumer Finance Act 2003 provides some assistance, given that they deal with the disclosure regime and they have the same maximum penalty provisions.

[17] In terms of mitigating factors, it is submitted that five percent can be given for co-operation, that steps to make refunds to consumers of between five and 10 percent would be appropriate. Regarding the guilty plea, it is submitted that should be no more than a 20 percent reduction, given the overall level of failure on the part of Godfreys.

Godfreys submissions

[18] Mr Gedye on behalf of Godfreys acknowledges that Godfreys were not aware of the 2014 amendment. Some detail has been given in terms of explaining Godfreys' position that, although it has been in the New Zealand market for 15 years, it has relied mainly on meeting its compliance obligations by taking advice through its Australian-based solicitors, that this is not a case of Godfreys disregarding or ignoring the law.

[19] While it is accepted that ignorance of the law is no excuse, this case is said to be different from a number of cases that have come before the Courts where non-compliance has been planned and deliberate. In the case of Godfreys, it is submitted that over the relevant period they have been seeking advice from their Australian-based solicitors, that as at September 2014 a review had been undertaken of Godfreys' general compliance with New Zealand law. That was done as part of Godfreys' Australian stock exchange listing. At no stage has it been highlighted to Godfreys that they have been in breach of the Act by their own advisors.

[20] Additionally, they have been members of several New Zealand retailing organisations and have not become aware of the law change relating to extended warranties through their membership. In respect of one of the organisations they are a member of, at some point prior to 17 June 2014 they ceased receiving information updates. Had they continued to receive those updates, the inference is that they would have become aware of the upcoming law change and they would have taken steps to ensure they were compliant.

[21] It is submitted that the offending should not be characterised as either cynical or premeditated, nor should it be seen as offending for financial gain. It is highlighted that, at all times, once Godfreys became aware of the Commissioner's investigation, that they immediately ceased selling the extended warranties.

[22] They have been in contact with approximately 1670 customers who purchased the extended warranties. Those are all the customers that they hold contact details for. Once they were in contact with those customers offering full refunds for the cost of the extended warranty, it is noted that 12 of those customers have taken up the offer of a refund. In respect of those customers that they have not been able to contact, they have made provision for offering a refund if and when contact is made.

[23] It is submitted that this is not a case where an example should be made of Godfreys, given what is said to be a unique situation for Godfreys in that they had been in receipt of advice; however, that advice had certain shortcomings. Whether that is related to the main legal advice coming from Australia I am not in a position to assess.

[24] There is, however, a significant difference between the starting point submitted on behalf of Godfreys in terms of the totality of the fine. It is submitted that it should be in the range of \$35,000 to \$45,000, that this should be seen as offending falling within the range of low- to mid-level offending. Twenty five percent should be deducted for mitigating factors and a further 25 percent for the plea of guilty.

[25] Filed with these submissions is an affidavit from the New Zealand General Manager of Godfreys, Mr Christopher Mason. In his affidavit, Mr Mason provides some detail in terms of the advice that Godfreys were receiving from their solicitors. He provides detail as to the nature of communications in the past that Godfreys have had with the Commissioner. He then highlights the steps that have been taken by Godfreys. He also goes into some detail in terms of one of the points made by Mr Gedye in his submission to counter the Commissioner's submission that, effectively, the extended warranties being offered by Godfreys were no better than what was being offered under the Consumer Guarantees Act 1993 or, potentially, they were of less value. The point made is that there was some value in terms of the extended warranties in that they covered matters which would not normally be covered by consumer guarantees for product damage for such things as water damage, electrical damage unrelated to the machine, the incorrect use of the product, improper maintenance of the product, those type of matters. The other important aspect was that the extended warranties gave a degree of certainty in terms of the length of coverage, for the period of time, as opposed to the Consumer Guarantees Act 1993 coverage of a reasonable period of time. The Godfreys warranties gave coverage in terms of a number of years.

[26] Mr Gedye also distinguishes the cases that have been referred to and submits that Godfreys is a reputable retailer, unlike some of the retailers that have been prosecuted in earlier cases, that this was not targeted offending, that it did not involve underhand behaviour such as hiding terms in the fine print.

Setting the starting point

[27] In terms of sentencing today, I need to take into account the purposes of sentencing. Accountability, denunciation and deterrence are relevant factors. I need to also consider the principles of sentencing.

[28] There is no direct authority for offending under s 36U, given that it is a relatively new piece of legislation. Both sets of submissions refer to the High Court decision of *Commerce Commission v LD Nathan & Co Ltd*¹. That case provides

¹ *Commerce Commission v LD Nathan & Co Ltd* [1990] 2 NZLR 160 (HC).

some guidance in that it gives some general sentencing principles, including taking into account the objectives of the Fair Trading Act 1986, the degree of culpability in the context of wilfulness or carelessness, the extent of prejudice or harm to customers, the attitude of the defendant in respect of remorse, co-operation with the authorities and remedial action, the importance of deterrence, any guilty pleas, the previous record of the defendant, and the effect of any publicity regarding the prosecution.

[29] In respect of each of the charges, it is a representative charge. The maximum penalty available is \$30,000. In this case, there are a large number of consumers who have been affected by Godfreys' failings, just over 3200. The cost of the extended warranties for approximately two thirds of the consumers involved a significant component of the total purchase price, ranging between 12 to 25 percent. In this case, there was a total failure on the part of Godfreys to comply with the legislation. In saying that, this is understandable given that Godfreys were not aware of the changes.

[30] The objective of the legislation was to ensure that consumers who are purchasing an extended warranty product are in an informed position. They should understand that there is coverage by virtue of the Consumer Guarantees Act 1993 simply by their being a consumer, and that if they are going to pay, in some cases, a reasonably significant proportion of the overall purchase price for an extended warranty, they must at least be in a position where they can make an informed decision as to the value of that warranty. In the case of Godfreys, for 3202 of their customers, apart from extending the period of coverage in terms of the time that coverage remained available for, and giving some certainty there, together with the possibility that the extended warranty covered matters additional to the Consumer Guarantees Act 1993, there was simply no opportunity for its customers to make an informed decision. Accordingly, the intent of Parliament, due to Godfreys' ignorance of the law change, has meant that a significant number of customers have been deprived of what Parliament saw as being a clear need for consumers to make informed choices.

[31] This was offending over a lengthy period of time, some 15 months. There is limited guidance from the cases that have been referred to. In my view, I am able to distinguish Godfreys' situation from those cases that have been referred to me. I accept that Godfreys is a reputable retailer and that they have sought to comply with their obligations under the Fair Trading Act 1986. They have sought legal advice, albeit from Australian-based solicitors. As I said earlier, whether therein lies the issue I am not able to say and, in some respects, that is irrelevant. The reality is that ignorance of the law does not provide Godfreys with an excuse and, no doubt, that is partly behind their decision to enter guilty pleas at the earliest opportunity and to co-operate with the Commissioner. This is not a situation where Godfreys have taken a cynical approach. It is simply a situation where, not being aware of the change, they have not been able to comply.

[32] In terms of the totality of the offending, the starting point I adopt is one of \$80,000.

Mitigating factors

[33] There are mitigating factors that are available. I take into account, given their 15 years in New Zealand, they have not previously been the subject of a prosecution by the Commissioner. That, however, needs to be tempered by the fact that on at least two occasions the Commissioner has reminded Godfreys, in writing, of their need to have an effective compliance scheme in operation. So, while they have not previously been the subject of a charge, they had been given fair warning.

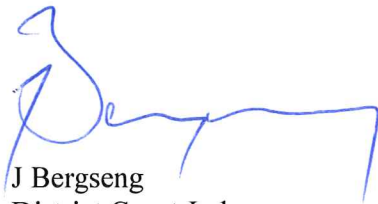
[34] In terms of the steps that have been taken to address the breach by instructing New Zealand solicitors and ensuring that there is regular monitoring of the Commissioner's website, I see that as a neutral factor. However, they have been fully co-operative with the Commissioner, they have made full refunds when they have been sought, and they have put in place provisions to enable future requests to be dealt with. It is also relevant that of the 1670-odd people who were contacted only 12 sought refunds. Taking those factors into account, I reduce the fine by 15 percent.

The guilty plea

[35] In terms of the guilty plea, that signals acceptance at an early stage. While the case may have, on the face of it, been a strong one, five of the charges involved whether or not oral advice had been given to consumers. Had the matter been defended, it could potentially have involved a significant number of witnesses and Court time. The plea of guilty has, therefore, ramifications in terms of overall costs and the saving of Court time, which had the potential to be significant. Given those factors, I have given a further credit of the full amount available, 25 percent.

[36] Accordingly, the fine is \$48,000 or \$4800 per charge. Court costs of \$130 are imposed on each of the 10 charges.

[37] Finally, I would like to thank counsel for the helpful submissions, both in writing and in Court today.

A handwritten signature in blue ink, appearing to read 'J Bergseng', with a long horizontal stroke extending to the right.

J Bergseng
District Court Judge